FILED
DEC 20 2000
CLERK

No. 00-801

IN THE

Supreme Court of the United States

STEPHEN SIMON,

Petitioner,

v.

VALUE BEHAVIORAL HEALTH INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION

BRUCE A. BECKMAN
Counsel of Record
JEFFREY P. SMITH
BRIAN F. ROWE
BECKMAN, DAVIS, SMITH & RUDDY LLP
601 South Figueroa Street, Suite 2600
Los Angeles, CA 90017-5704
(213) 624-4900

Attorneys for Respondents

(Additional Counsel and the names of the Certain Respondents are listed on the signature page)

164216

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

The following Respondents have no parent corporations and no publicly held company owns 10% or more of any of its stock: The Prudential Insurance Company of America, The Guardian Life Insurance Company of America, Pacific Mutual Life Insurance Company, PM Group Life Insurance Company, Blue Cross/Blue Shield of Ohio, Mutual Health Service Co., McDonough Caperton, Inc., McDonough Caperton, Inc. Employee Benefit Plan, Health Management Strategies International, Inc., Capp Care, Inc., Benefit Panel Services, PCA, Health International, PPG Industries, Inc., Rocky Mountain Medical Service, dba Blue Cross and Blue Shield of Colorado and Stanislaus Foundation for Medical Care.

Respondent, The Great-West Life Assurance Company, is the subsidiary of Great West Life Co., Inc., whose parent companies are Power Financial Corporation and Power Corporation of Canada. Power Corporation of Canada is a publicly held company in Canada.

Respondent ReliaStar Life Insurance Company is a subsidiary of ING Groep N.V. which is publicly traded and owns more than 10% of the stock of ReliaStar Life Insurance Company.

The parent company for Respondents, Value Behavioral Health, Inc., Value Health, Inc., Preferred HealthCare, Ltd., and American Psychmanagement, Inc., is Value Options, Inc., which is wholly owned by FHC Health Systems, Inc. No publicly held company owns 10% or more of the stock of these Respondents.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iv
The Case Below	1
A. *Petitioner's Claims Below.*	1
B. *The Service Of Process Problems.*	1
C. *The Dismissal Of Petitioner's Various Claims.*	2
D. *The District Court's Procedural Orders And Conduct.*	3
The Opinions Below	4
Reasons for Denying the Writ	4
A. *Petitioner Has Set Forth No Basis For The Exercise Of Certiorari Jurisdiction. He Is Merely Seeking A Further Hearing On The Basis Of Alleged Error.*	5
B. *The District Court And The Ninth Circuit Properly Applied Statutory Provisions And Well-Established Case Law.*	5

Contents

	Page
C. *Petitioner's Claims Of Mistreatment, Evidence Suppression And Misconduct By Both The District Court And The Ninth Circuit Are Untrue.*	6
Conclusion	10

TABLE OF CITED AUTHORTIES

Page

Cases:

McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996) .. 7

Stephen Simon v. Value Behavioral Health Inc., et al., 955 F. Supp. 973 (C.D. Cal. 1997) 4

Stephen Simon v. Value Behavioral Health Inc., et al., 208 F.3d 1072 (9th Cir. 2000) 4

Statutes:

18 U.S.C. § 1961, *et seq.* 1

29 U.S.C. § 1001, *et seq.* 1

29 U.S.C. § 1132(a)(1)(B) 6

29 U.S.C. § 1132(d)(1) 1

Rules:

Federal Rule of Civil Procedure 8 7

Federal Rule of Civil Procedure 41(b) 7

United States Supreme Court Rule 10 5

THE CASE BELOW

A. *Petitioner's Claims Below.*

Petitioner brought an action in the United States District Court For the Central District of California in which he joined (i) approximately 600 separate, unrelated ERISA[1] plan benefit claims, (ii) antitrust claims under the Clayton Act and the Sherman Act, (iii) RICO[2] claims, and (iv) certain state law tort claims.

The claims were asserted against approximately 1,600 defendants, consisting of companies and their ERISA plans, individual chief executive and other officers, the insurance companies which funded certain of the ERISA plans, and a number of their chief executive and other officers, together with governmental entities and agencies.

B. *The Service Of Process Problems.*

Petitioner attempted to serve all of the ERISA plans by serving insurance companies which were not the plan administrator or plan trustee, as required by 29 U.S.C. § 1132(d)(1). The District Court gave petitioner three months of additional time to effect service, but set a time limit by which petitioner had to accomplish service and held to it. This was ample time for petitioner to have served the plans, or the Secretary of Labor on behalf of the plans, under 29 U.S.C. § 1132(d)(1).

---

1. The Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1001, *et seq.*] ("ERISA").

2. The Racketeering Influenced And Corrupt Organizations Act [18 U.S.C. § 1961, *et seq.*] ("RICO").

C. ***The Dismissal Of Petitioner's Various Claims.***

1. Petitioner's ERISA claims were dismissed on the ground that, as the assignee of assignee medical providers, he was not a person authorized to sue for plan benefits under ERISA. Petitioner was specifically given leave to refile these claims separately.

2. Petitioner's state law claims were dismissed or abandoned as being preempted by ERISA, which applied whether or not he had standing.

3. Petitioner's Clayton Act claims were dismissed on the grounds that the Clayton Act does not apply to services, and petitioner was suing to recover for services allegedly rendered by his assignor providers.

4. Petitioner's Sherman Act claims were ultimately dismissed without leave on the grounds that petitioner failed to allege, after repeated tries and pointed suggestions from the District Court, (i) a contract, combination or conspiracy among two or more distinct business entities not under common ownership, (ii) which was intended to harm or unreasonably restrain competition in interstate commerce, (iii) which actually caused injury to such competition, and (iv) that such injury was in the identified, defined product and geographic market in which petitioner's assignor providers engaged in commerce.

5. Petitioner alleged that his assignors had been injured by the coming into existence of preferred provider networks (which he claimed to be one giant entity), managed care organizations, and two-tiered contracts, which pay a higher percentage of provider fees to those providers who are in the particular plan's list of preferred providers, than to out-of-network providers. Petitioner's basic failure, as repeatedly

pointed out to him by the District Judge, was a complete failure to allege facts to show any concerted action among the defendants.

6. Petitioner's RICO claims were ultimately dismissed without leave on the grounds that petitioner failed to allege, after repeated tries and further suggestions from the District Court, (i) a RICO enterprise that was separate and distinct from the alleged pattern of racketeering activity, (ii) that the various defendants participated as principals in the pattern of racketeering activity, received income from that activity, and directly or indirectly invested the income in an enterprise which affected interstate commerce, and (iii) participation in a conspiracy to engage in a pattern of racketeering activity.

D. ***The District Court's Procedural Orders And Conduct.***

The District Court at no time chastised petitioner for bringing his action. The Court expressed concern over how the case was going to proceed, and whether it would ever be at issue. The Court told petitioner repeatedly that he needed to make short, plain statements of fact in his complaints to set forth his claims, and that he needed to state facts to show some concerted action among any defendants against whom he wished to state conspiracy claims. The thrust of the Court's suggestions was that it was not enough to allege that the United States Marines and Proctor & Gamble both used managed care programs, with preferred providers and two-tiered provider reimbursement, therefore they had conspired against petitioner's assignor providers.

Petitioner initiated discovery before he had a complaint on file which stated a viable claim. Petitioner planned to conduct depositions all around the country, initially of the

chief executive and other senior officers of defendant companies, and required massive document productions, as to which petitioner suggested that a large document repository be established.

The District Court declined to allow that process to go forward, with the enormous expense involved, until petitioner had demonstrated that he could state a claim against at least one defendant. In this connection, the Court made a case management order dismissing, without prejudice, and subject to being rejoined if the facts supported it, all defendants except Value Behavioral Health, Inc. Petitioner was instructed to set forth a short plain statement of his claims, to see if he could state a viable claim against one defendant, with the proviso that others could be joined on motion if facts were alleged to justify joinder.

THE OPINIONS BELOW

There are two published opinions in this case, one by the District Court, *Stephen Simon v. Value Behavioral Health Inc., et al.*, 955 F. Supp. 973 (C.D. Cal. 1997), dismissing petitioner's ERISA claims, and the other an affirmance by the Ninth Circuit, after more pleadings and the ultimate dismissal of the action without leave, *Stephen Simon v. Value Behavioral Health Inc., et al.*, 208 F.3d 1072 (9th Cir. 2000). Copies are appended to the petition.

REASONS FOR DENYING THE WRIT

The petitioner's argumentative "questions presented" fail to set forth any basis for granting a writ of certiorari.

A. *Petitioner Has Set Forth No Basis For The Exercise Of Certiorari Jurisdiction. He Is Merely Seeking A Further Hearing On The Basis Of Alleged Error.*

The questions presented by petitioner appear to be (i) error below in finding he had no standing to bring assigned ERISA benefit claims, (ii) error below in dismissing petitioner's antitrust claims, (iii) error below in not further extending time to petitioner for the service of process, (iv) error below in not giving petitioner, as a *pro se* litigant, even more latitude, and (v) error by the Ninth Circuit in not reversing the District Court.

None of these matters are supported in the petition, and if they were, these questions show only that petitioner is seeking a further hearing after defeat in the Ninth Circuit. None of the reasons set forth in Rule 10 of the Supreme Court Rules, nor any reasons of similar character, are set forth in the petition. No showing has been made of any conflict in the circuits, decision on an important federal question in conflict with a decision of a state court of last resort, or departure from accepted judicial procedure sufficient to require supervision by this Court, as to the proceedings below.

No important issues of federal law and no Constitutional issues have been raised in the petition.

B. *The District Court And The Ninth Circuit Properly Applied Statutory Provisions And Well-Established Case Law.*

The District Court and the Ninth Circuit properly determined that petitioner, as the assignee of providers who were in turn assignees of the plan participants or

beneficiaries, was not a person authorized to sue for benefits by 29 U.S.C. § 1132(a)(1)(B). That section limits the persons authorized to bring a civil action to recover benefits to plan participants and beneficiaries. Petitioner was neither.

Petitioner's antitrust and RICO claims were properly denied because he failed to allege facts sufficient to constitute a claim. The District and Circuit Courts merely applied well-established precedent.

C. *Petitioner's Claims Of Mistreatment, Evidence Suppression And Misconduct By Both The District Court And The Ninth Circuit Are Untrue.*

All of petitioner's claims of mistreatment and misconduct by the District Court and the Ninth Circuit amount to no more than that those Courts did not agree with him.

Petitioner has claimed, among other things, that he was not accorded proper latitude as a *pro se* litigant, and that the District Court mistreated him by being impatient with petitioner and refusing "to allow adequate time" to serve the approximately 1,600 defendants, staying discovery (referred to as "suppression of evidence"), and not accepting petitioner's allegations as true.

In fact, the District Court displayed great forbearance and courtesy in dealing with petitioner, and allowed him ninety additional days for service of process. The District Court stayed discovery as premature until a proper complaint was filed because of the prospect of enormous expense involved. The District Court did accept petitioner's factual allegations as true, but found them insufficient to state a claim.

Petitioner has not supported any of his allegations against the courts by any facts or authority in his petition.

Petitioner's Second Amended Complaint was 182 pages long, of which the first 39 pages were caption to name the defendants. To this was appended an Exhibit 1 of 323 pages, plus additional documents as Exhibits A through V. In none of that expanse did he manage to plead facts constituting a claim.

This was typical of petitioner's pleadings, which all consisted of lengthy narrative and argument and never alleged facts to establish the necessary elements of his antitrust and RICO claims.

Petitioner had four attempts to state his purported claims. The District Court, in its order dated August 14, 1997, instructed petitioner to make a short, plain statement of his claims against the remaining defendant, Value Behavioral. Petitioner ignored that order and filed a lengthy, rambling pleading which purported to incorporate all of his prior pleadings not ordered stricken and which realleged essentially the same narratives and theories pleaded in the first and second amended complaints. That alone justified dismissal under Rule 8 and Rule 41(b) of the Federal Rules of Civil Procedure [*McHenry v. Renne*, 84 F.3d 1172, 1177-1179 (9th Cir. 1996)].

Petitioner's claims all required acceptance of his generalized, conclusionary allegations of an industry-wide conspiracy against his assignor providers. His problem throughout was that which the District Court expressed with respect to petitioner's second amended complaint, in its order of August 14, 1997:

> It has become apparent to the Court that the only factual connection between the numerous defendants is their participation in the diverse field of health care . . . Plaintiff's Second Amended Complaint fails to allege any facts which reflect all of the nearly 1600 defendants have engaged in a common course of conduct sufficient to support Plaintiff's Sherman Act, Clayton Act, RICO or FEHB claims.

All of petitioner's Sherman Act, Clayton Act, RICO and FEHB violations were founded on the existence of this conspiracy. The formation of "Preferred Providers," the coming into existence of HMO's and managed care were all attributed to the conspiracy, and alleged to be fraudulent, without supporting specifics.

How all of this came into being as a result of concerted action was never alleged. No role of any defendant in creating any of these matters was ever alleged. This Court may take judicial notice of the common knowledge that preferred provider organizations and managed care developed over time beginning in the 1950's, with the Blue Cross-Blue Shield hospital and physician networks, Kaiser Permanente, Ross-Loos, and similar organizations, and were cost driven from the start.

All of petitioner's claims failed because of his failure to allege facts to support his conspiracy theory, apart from all of the other deficiencies in his pleadings. Managed care, HMO's and preferred provider networks came into existence to contain cost. Petitioner does not like the results, which apparently prevented his assignor providers from continuing to charge fees at the level to which they had become

accustomed. That did not entitle petitioner to antitrust and RICO relief.

The District Court properly dismissed his action with prejudice, and the Ninth Circuit properly affirmed.

CONCLUSION

Petitioner has presented no questions which warrant review by this Court, and has not supported the questions he has stated.

It is therefore respectfully submitted that petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRUCE A. BECKMAN
Counsel of Record
JEFFREY P. SMITH
BRIAN F. ROWE
BECKMAN, DAVIS, SMITH & RUDDY LLP
601 South Figueroa Street, Suite 2600
Los Angeles, California 90017-5704
(213) 624-4900

Attorneys for Respondents Value Behavioral Health, Inc., Value Health, Inc., Preferred HealthCare, Ltd., American Psychmanagement, Inc., Robert Patricelli, The Prudential Insurance Company of America, The Guardian Life Insurance Company of America, Pacific Mutual Life Insurance Company, PM Group Life Insurance Company, Blue Cross/Blue Shield of Ohio, Mutual Health Service Co., McDonough Caperton, Inc., McDonough Caperton, Inc., Employee Benefit Plan and Health Management Strategies International, Inc.

Additional Counsel and Respondents joining this Brief in Opposition

STEPHEN HEWITT
ERICA AROUESTY
HEWITT & PROUT
Suite 600
4640 Lankershim Boulevard
North Hollywood, CA 91602-1818

Attorneys for Respondents CappCare, Inc., Michael Henry, Health International Inc., Stanislaus Foundation for Medical Care, Benefit Panel Services, Executive Risk (PCA) and Stanislaus Foundation for Medical Care

DAVID C. PARK
BARGER & WOLEN
34th Floor
515 South Flower Street
Los Angeles, CA 90071-2206

Attorneys for Respondents The Great-West Life Assurance Company and Rocky Mountain Medical Service, dba Blue Cross and Blue Shield of Colorado

NEIL MCTEIGUE
BUCHANAN INGERSON
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410

Attorneys for Respondent
PPG Industries, Inc.

JAMES P. COLLINS, JR.
COTKIN, COLLINS & GINSBURG
SUITE 800
200 WEST SANTA ANA BOULEVARD
POST OFFICE BOX 22005
SANTA ANA, CA 92702-2005

Attorneys for Respondent
Reliastar Life Insurance Company